those matters only which were necessary to support the judgment in the particular case. Passing those cases which were not decided on their merits, and those in which a single cause of action is made the basis of two suits, it may be said that the question of what is included within the plea of res judicata arises in either of two ways.

The first way in which the question arises is by one of the parties to the action seeking to include within the plea certain matter which does not appear upon the face of the judgment to have been determined by the court. It may be either that the parties failed to present the matter properly to the court, or that the matter, having been properly presented, was not included in the judgment. In either event if a determination of the matter was essential to a complete adjudication of the case, it will be closed to further litigation, leaving the aggrieved party without remedy, unless an appeal is still open to him.[3]

The second way in which the question may arise is the converse of the preceding—the party seeks to include within his plea certain matter which appears upon the face of the judgment to have been adjudged, but which was immaterial or collateral to the issue of the case. Under such circumstances the rule as applied is that the judgment is conclusive only as to that which was necessary to support it and the opposite party is permitted to introduce evidence regarding such collateral matter just as though the former decision had never been rendered.[4]

Except as indicated in these cases, it seems that a judgment is not final as regards any matter where such matter is put in issue in a subsequent suit upon an independent cause of action. The dicta to the contrary are unfortunate as they have tended greatly to confuse the the subject. B. B. B.

Landlord and Tenant: Effect of Surrender on Rights of Sublessee: Rights of Original Lessor.—What are the rights of C, a subtenant, where B, his lessor, the original tenant, surrenders his lease to his landlord, A? Manifestly, as decided in Buttner v. Kasser, 15 Cal. App. Dec. 315 (Sept. 20, 1912), C's rights cannot be affected by B's surrender made without his consent. Though he takes subject to the risk of being ousted by the forfeiture of B's estate, C does not assume the risk of being ejected because B chooses to destroy his own estate by surrender. "Having regard to strangers who were not parties or privies thereto, the estate surrendered hath in consideration of law a continuance." [1] An action for use and occupation will not lie, the principal case very properly holds, for the rights of the subtenant must be gov-

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[3] Silverston v. Mercantile Trust Co., 14 Cal. App., Dec. 182 (Feb. 1912), which criticizes Freeman v. Barnum, 131 Cal. 387; 63 Pac. 691 (1901); Flynn v. Hite, 107 Cal. 455; 40 Pac. 749 (1895).

[4] Chapman v. Hughes, 134 Cal. 641; 58 Pac. 298 (1899).

[1] Co. Lit., 338b; Pugh v. Arton, L. R. 8 Eq. 626 (1869).

erned by the covenants of his lease. But who may sue upon the covenants of C's lease? B manifestly cannot, for he has destroyed his estate by his act of surrender.[2] May A do so? There are difficulties in the way. The technical effect of the surrender by B was to merge his estate in A's greater estate, and it is difficult to see how A can have at the same time a fee simple and an estate for years, or as in the principal case a lease for twenty-five years and also one for fifteen years running simultaneously. A dictum in an earlier California case,[3] cited in Buttner v. Kasser, says that "the underlessee holds without payment of any rent at all." However unjust this result, it has often been stated as the rule of the common law.[4] Statutes in England and in many of the States of this country have long since changed the hardship, so that the surrenderee is now able in those jurisdictions to sue on the covenants in the sublease.[5] Such a statute has not been passed in California, however.

Notwithstanding the failure of our Legislature to adopt the English Statutes, it can hardly be believed that our courts will follow the dictum in Bailey v. Richardson. One court, where no statute was passed, has boldly sacrificed the elegance of the law to the needs of justice and has said that the surrenderee, the principal landlord, is an assignee for this purpose, and, in the absence of better grounds, this decision should on general principles of fairness be followed.[6] While judicial legislation serves to meet the particular situation, what of the case where the intermediate lessor surrenders to the main landlord for the purpose of taking a new lease for a longer period? The problem would doubtless be solved in some such manner as the Pennsylvania court resolved the other case. Where a rule of the common law seems so repugnant to natural justice, it may not even be irreverent to question the sources and to suggest that as the surrenderee may not deny that the sublease still exists,[7] why should not the subtenant be equally estopped? It may be that the common law authorities on which the dictum in Bailey v. Richardson rests have overlooked the possibility of a lease by estoppel. A lease with only a lessee and with no lessor is a metaphysical subtlety beyond the grasp of the ordinary mind.

But, whatever the future of this doctrine, it is meanwhile interesting to note the fact that a sublessee is a person to be reckoned with by purchasers of lands. The moral of the principal case is that no sur-

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[2] Grundin v. Carter, 99 Mass. 15 (1868).

[3] Bailey v. Richardson, 66 Cal. 416, 421 (1885).

[4] 1 Taylor, Landlord and Tenant, § 518; 4 Kent's Commentaries, 103; 1 Tiffany, Landlord and Tenant, § 12, sub. 11, p. 98; 2 Tiffany, § 191, p. 1352; Appleton v. Ames, 150 Mass, 34, 42 (1889).

[5] 4 Geo. II, c. 28; 8 & 9 Vict., c. 106, § 9; Stimson, American Statute Law, § 2063.

[6] Hessel v. Johnson, 129 Pa. St. 173; 18 Atl. 754; 15 Am. St. Rep. 716; 5 L. R. A. 851 (1889).

[7] The cases all sustain this position, which is well stated in the principal case.

render should be taken without the sublessee's consent. He is at least entrenched in his possession beyond the power of the mesne tenant and the landlord to dislodge him. It should be noted that the principal case merely decides that no action for use and occupation lies,—it does not lay the ghost of the dictum in Bailey v. Richardson, and it is possible, though we believe hardly probable, that the courts may in the future decline to enforce the sublease on behalf of the landlord against the subtenant. O. K. M.

Negligence: Independent Proximate Cause.—In the case of Schwartz v. California Gas & Electric Company.[1] plaintiff sued defendant for an injury to his horse caused by its stepping on an insulator which the evidence tended to show was left on the plaintiff's premises by an employee of the defendant some months before while engaged in doing reconstruction work on defendant's pole. The evidence seemed to show that the insulator must have been dropped at a point some distance from where it was when the horse was injured. The Supreme Court holds that the refusal to give following instructions was error: "You cannot find for the plaintiff unless you find that (1) plaintiff's horse was injured by the insulator, the property of the defendants, and (2) that the employees of the defendant negligently placed said insulator on the premises where it is claimed said horse was injured, and at the point where said evidence shows said horse was in fact injured."

In support of this decision, the court says, "while there was no direct evidence that any third party moved said insulator, circumstances do appear from which a rational inference may be drawn to that effect and therefore it was a proper question to submit to the jury. . . . We are of the opinion that the requested instruction was not an instruction as to the facts, but that it correctly stated the law in view of the testimony." It will be well in cases of this nature to remember this language of the court, "we are of the opinion that the requested instruction correctly stated the law in view of the testimony," for it is these words which justify the court in approving the requested instruction. Ordinarily such an instruction would prejudice the case and take from the jury any consideration as to what was the proximate cause of the injury.

Whether or not the casual connection between the original negligence and the injury was broken in a particular case is often a difficult question of fact which can best be determined by the common experience of mankind. Consequently, such matters should be left to the jury. If they find that the injury complained of in any case was a natural and probable consequence of the original negligence, then according to the present tendency of the decisions in most American jurisdictions, as well as the latest English decisions, the original negligent party is responsible for the injury regardless of the number of

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[1] 125 Pac. 1044, Aug. 3, 1912.